BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

In the Matter of the Complaint of Eschelon Telecom of Minnesota, Inc. Against Qwest Corporation Inc.

ISSUE DATE: February 27, 2004

DOCKET NO. P-421/C-03-627

ORDER GRANTING ESCHELON SUMMARY JUDGEMENT AND REQUIRING A REFUND

PROCEDURAL HISTORY

On April 23, 2003, Eschelon Telecom of Minnesota, Inc. (Eschelon) filed a complaint against Qwest Corporation, Inc. (Qwest) alleging, among other things, that Eschelon was entitled to a refund of payments made for private lines that should have been available to Eschelon as combinations of unbundled network elements known as EELs, and that Qwest's failure to reprice those circuits violated the parties' Interconnection Agreement (ICA) and Minnesota statutes.

On June 2, 2003, the Commission's NOTICE AND ORDER FOR HEARING referred the matter to the Office of Administrative Hearings (OAH) for contested case proceedings.

On August 28, 2003, Qwest filed a motion for summary judgement with the Administrative Law Judge (ALJ).

On August 28, 2003, Eschelon filed its initial brief and motion for summary judgement with the ALJ.

On September 26, 2003, the Minnesota Department of Commerce (DOC) filed a response to Qwest's motion, Qwest filed reply comments and Eschelon filed a reply brief.

On October 15, 2003, the ALJ issued her Recommendation Granting Eschelon's Motion for Summary Disposition - EELs. The ALJ recommended that the Commission deny Qwest's motion for summary judgement and grant Eschelon's motion for summary judgement. Further the ALJ recommended that Eschelon be given credit for the difference in rates Qwest charged Eschelon

from March 2000, when EELs were first offered, through the date that Qwest converted the special access lines to EELs.

On November 4, 2003, Qwest filed its exceptions to the ALJ's recommendations.

On November 14, 2003, Eschelon filed its reply to Qwest's exceptions.

This matter came before the Commission on January 29, 2004, when the record closed under Minn. Stat. § 14.61, subd. 2.

FINDINGS AND CONCLUSIONS

I. Summary of Eschelon's Complaint

Eschelon complained that Qwest had not given Eschelon the opportunity to purchase enhanced extended loops (EELs), the combination of an unbundled loop and dedicated interoffice transport, at unbundled network element (UNE) prices. Rather, Qwest required Eschelon to purchase special access circuits at higher rates that were set in state and federal private line tariffs.

Eschelon requested a refund of the difference between the tariffed rates for the special access circuits and the amount Eschelon would have been charged under the lower, UNE, cost based rates. Eschelon requested that it be granted a refund of $532,225.46 based on the difference in rates for the period from March 2000 to April 30, 2002.

II. Position of the Parties

All parties agreed that no material facts were in dispute and that the matter could be resolved by summary judgement.

A. Eschelon

Eschelon argued that under the terms of its Interconnection Agreement (ICA) with Qwest, loop distribution and dedicated transport, the network elements that constitute EELs, were to be provided at UNE rates.

Eschelon also argued that the Federal Communications Commission (FCC), in the UNE Remand Order,[1] required that EELs must be made available to competitive local exchange carriers (CLECs) at UNE prices. Further, Eschelon argued, the FCC required that incumbent local exchange carriers (ILECs), upon request, must convert or reprice special access circuits into an EEL.

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[1] *FCC Third Report and Order*, CC Docket No. 96-98, 15 FCC Rcd at 3909, Paras. 480-81, November 5, 1999. (The UNE Remand Order).

Eschelon argued that it wanted to purchase EELs in early 2000 but that Qwest did not offer a process to order EELs or convert its special access circuits to EELs until October 2001.[2] Prior to 2001, Qwest required Eschelon to purchase EELs as special access circuits at tariffed rates as opposed to UNE rates, which are lower than the tariff prices.

In the period from March 2000, to October, 2001 Eschelon purchased 113 special access circuits from Qwest's Minnesota and private line tariff. Beginning in October 2001, Eschelon was able to order and convert EELs. However, Qwest would not reprice the previously ordered special access circuits as EELs nor would Qwest refund the difference between the UNE and tariffed rates.

Eschelon was requesting a refund of $532,225.46 for the difference between Qwest's tariffed rates billed and paid by Eschelon and Eschelon's ICA rates for the elements that make up an EEL. For the period from March 2000 through April 30, 2003, Eschelon was billed and paid $839,671.37 for these circuits. If these had been ordered as EELs, Eschelon would have paid $307,445.91 for these circuits. The difference was $532,225.46.

Finally, Eschelon claimed that in June of 2001, Qwest settled the same issues with MCI WorldCom Network Services (MCI WorldCom). The settlement provided for a payment to MCI WorldCom for past services billed. Eschelon argued that it had the same basic ICA as MCI WorldCom and that it should be entitled to the same settlement terms.

B. Qwest

Qwest argued that the ICA did not contain the UNEs necessary for ordering EELs. Qwest stated that Eschelon should have agreed to enter into an ICA amendment in order to obtain EELs.

Also, Qwest argued that Eschelon did not identify its request as a request for EELS. Rather, Eschelon purchased these access services out of Qwest's valid federal and state tariffs. Qwest argued that a tariff, once approved, carries the full force of law and must be enforced. It argued that the Filed Rate Doctrine, which mandates that the terms and rates by which a carrier offers and charges for a service covered under a tariff must be exactly the same as those terms and rates set forth in the tariff, applies in this case. For Qwest to be required to change those rates would be to ignore the tariff.

Finally, Qwest argued that the settlement agreement it entered into with MCI WorldCom was not part of an ICA and the terms were not available to Eschelon.

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[2] Beginning March 30, 2000, Qwest made EELs available to competitors, including Eschelon, but only on a limited basis and only for new requests, not conversions.

C. DOC

The DOC argued that since November 1999, the FCC has required LECs such as Qwest to offer unbundled access to the elements that make up EELs. It cited the UNE Remand Order [3] as confirming that the loop and dedicated transport were subject to the unbundling and pricing requirements of the Telecommunications Act of 1996 (the Act)[4] and FCC rules. Further, the DOC noted that the UNE Remand Order stated that the LEC "may not separate loop and transport elements that are currently combined and purchased through the special access tariff" and required that carriers, such as Eschelon, were entitled to obtain existing loop-transport combinations at unbundled network prices.[5]

The DOC also agreed that the parties' ICA listed loop distribution and dedicated transport as unbundled network elements that Qwest was obligated to provide to Eschelon pursuant to its obligations under Section 251 of the Act.

The DOC argued that Qwest's claim that Eschelon ordered out of the tariff and that the tariffed rate must prevail is clearly outweighed by the Commission's clear regulatory authority to require Qwest to provide the requested UNEs at UNE rates.

D. The ALJ's Report

The ALJ recommended that Qwest's motion for summary judgement be denied and Eschelon's motion for summary judgement be granted.

The ALJ cited the FCC UNE Remand Order, paragraph 480, as confirming that the loop and dedicated transport are separate network elements subject to the unbundling and pricing requirements of the Act and the FCC rules. The ALJ noted that the UNE Remand Order stated that an ILEC, such as Qwest, "may not separate loop and transport elements that are currently combined and purchased through the special access tariffs."

The ALJ also found that the Qwest/Eschelon ICA listed loop distribution and dedicated transport as unbundled network elements that Qwest must provide to Eschelon. Qwest was required to provide these individually and in combination.

The ALJ concluded that despite the direction given by the FCC and the provisions of the ICA, Qwest offered Eschelon only limited EELs until 2001.

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[3] Id at ¶ 480.

[4] Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of title 47, United States Code).

[5] See Footnote 3, supra.

Since Qwest was obligated to offer the EELs at cost-based rates but did not do so, Qwest cannot claim that Eschelon must pay the higher rates forced on it by Qwest. To find otherwise would allow Qwest to benefit from its action.

The ALJ concluded, in response to Qwest's argument that the Filed Rate Doctrine prohibits Qwest from charging anything less than the tariffed rates, that the Filed Rate Doctrine did not apply in this situation. Rather, in the present case, Qwest had a clear obligation under the ICA to offer Eschelon a UNE rate rather than the tariffed rate. When Eschelon made its purchases, Qwest was not offering the cost-based UNE price required by the ICA and federal and state law. Therefore, Eschelon was compelled to purchase the service through the tariffs. Eschelon is not challenging the tariffed rate itself. Eschelon is challenging Qwest's not offering what it was obliged to offer and as a result Eschelon was compelled to order the service under the tariff. For this reason, the Filed Rate Doctrine does not apply.

Further, the ALJ concluded that Eschelon was entitled to a refund of the difference between the tariffed rates and the cost-based rates from the time of Eschelon's initial order in March of 2000, through the date that Qwest converted each special access line to EELs.

Finally, the ALJ determined that Eschelon was not entitled to "opt-in" to the Qwest/MCI WorldCom settlement as a separate basis for recovering a rate refund. Because the settlement agreement was a settlement of past billing disputes, contained no forward looking obligations and did not set out any rates, terms or conditions for acquisition of future EELs or other UNEs, it was not subject to the "opt-in" provisions of the Act.

III. Exceptions to the ALJ's Recommendations

A. Qwest

Qwest argued that Eschelon never ordered or requested EELs prior to October 1, 2001. Qwest argued that under the ICA Qwest had no obligation to convert private circuits covered by tariffs into EELs absent a request from Eschelon. Qwest also argued that because Eschelon did not give notice of its claim that Qwest was in breach of the ICA, Eschelon's claim was barred.

Further, Qwest argued that Eschelon chose to place orders under the federal and state tariffs and paid the amounts under those tariffs. The Filed Rate Doctrine is applicable to these tariffs and to Eschelon's orders under these tariffs.

Finally, Qwest argued that some of the circuits that Eschelon purchased were out of the federal tariff and the Commission does not have jurisdiction over claims relating to federally tariffed services.

IV. Commission Action

The Commission accepts, adopts and incorporates herein the ALJ's Recommendation Granting Eschelon's Motion for Summary Disposition - EELs. The Commission agrees that there is no dispute of material facts and that Eschelon is entitled to judgement as a matter of law. It agrees that Qwest's motion for summary judgement should be denied. The Commission also agrees that Eschelon is entitled to the difference between the rates Qwest charged Eschelon from March 2000 when EELs were first offered, through the date that Qwest converted the special access lines to EELS.

The Commission agrees with the ALJ that Qwest has an obligation to offer unbundled access to the elements that comprise EELs, loop distribution and dedicated transport, at cost-based rates and Qwest did not fulfill its obligation.

Qwest's obligation is clear. It is uncontested that the FCC, in its UNE Remand Order, clarified that EELs include the loop and the dedicated transport and required ILECs, such as Qwest, to provide unbundled access to the network components that constitute EELs. The ILECs were required to make EELs available at UNE cost-based rates and carriers such as Eschelon were entitled to obtain EELs at the UNE prices.

Further, Qwest and Eschelon entered into an ICA, approved by this Commission in October 1999, which, among other things, included the network elements that comprise EELs among the unbundled network elements listed in the ICA. Under this agreement, Qwest was required to offer these network elements individually and in combination with other network elements.

Despite this clear obligation, there is no question that Qwest offered only limited EELs until 2001. Prior to that time, Eschelon, in order to get the elements it needed, was required to order them from Qwest's state and federal tariffs. Now Qwest argues that Eschelon chose to order under the tariffs and did not request EELS, even though Qwest did not offer EELs outside the tariffs.

The Commission cannot approve Qwest's ignoring its obligations and then not being held responsible for the consequences. In this case, because Qwest did not fulfill its obligations, Eschelon paid higher rates for the elements it needed. For this reason, Qwest should be responsible for the difference between what Eschelon paid under the tariffs and what it should have paid under the UNE cost-based rates.

Although Eschelon was able to place its first EEL orders in October 2001, the Commission recognizes that the conversions were phased in. Therefore, the Commission agrees with the ALJ that Eschelon should receive a refund for each special access circuit until it was converted to an EEL.

The Commission is also in agreement with the ALJ that the Filed Rate Doctrine does not apply. There is no challenge to either the federal or state tariffs. There is no request that the tariffed rate

be modified. Rather, the issue is whether Eschelon should have been required to purchase through the tariffs or was it entitled to lower rates outside the tariffs. The tariffed rate is being referenced solely to determine the difference between what Eschelon paid and what it would have been required to pay if the EEL had been properly provided.

The same reasoning applies to Qwest's argument that the Commission does not have jurisdiction over a number of the circuits because they were ordered from a federal tariff. Again, the Eschelon is not making any claim about the federal tariff, it is making a claim about EELs.

For all these reasons, the Commission will grant Eschelon's motion.

ORDER

1. Qwest's motion for summary judgement is hereby denied.

2. Eschelon's motion for summary judgement is hereby granted.

3. The Commission concurs in and adopts the findings, conclusions and recommendations of the ALJ.

4. Qwest shall refund $532,225.46 to Eschelon within 30 days of this Order.

5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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